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JUL 11 2007

OFFICE OF PETITIONS

In re Application of	:	
Ding et al.	:	
Application No.: 10/671399	:	DECISION ON
Filing or 371(c) Date: 09/25/2003	:	PETITION
Title of Invention:	:	
STABLE AQUEOUS	:	
SLURRY SUSPENSIONS	:	

This is a decision in response to the "Petition to Withdraw Holding of Abandonment based on Failure to Receive Office Action (MPEP 711.03(c)II and 37 CFR 1.181," filed April 5, 2007. The delay in treating this petition is regretted.

This Petition is hereby **dismissed**.

Any further petition must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under [insert the applicable code section]." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

Background

The above-identified application became abandoned for failure to timely and properly reply to the Notice of Allowance and Issue Fee Due, and Notice of Allowability, mailed July 31, 2006. The Notices set a non-extendable three (3) month period for reply.

The Office action was mailed to Applicant at the correspondence address of record, however, the Office action was returned to this office by the United States Postal Service ("USPS) on August 15, 2006.

Petition under 37 CFR 1.181

Applicant requests withdrawal of the holding of abandonment because the Notices were not found. Applicant requests this Office review the file and determine correspondence address to which the Notice of Allowance was mailed. Applicant files a Change of Correspondence Address with the petition, changing the correspondence to Largo, Florida. Applicant requests a copy of the Notice of Allowance.

Applicable Law, Rules and MPEP

The MPEP 711.03(c)A, Petition To Withdraw Holding of Abandonment Based on Failure To Receive Office Action, provides

In Delgar v. Schulyer, 172 USPQ 513 (D.D.C. 1971), the court decided that the Office should mail a new Notice of Allowance in view of the evidence presented in support of the contention that the applicant's representative did not receive the original Notice of Allowance. Under the reasoning of Delgar, an allegation that an Office action was never received may be considered in a petition to withdraw the holding of abandonment. If adequately supported, the Office may grant the petition to withdraw the holding of abandonment and remail the Office action. That is, the reasoning of Delgar is applicable regardless of whether an application is held abandoned for failure to timely pay the issue fee (35 U.S.C. 151) or for failure to prosecute (35 U.S.C. 133). To minimize costs and burdens to practitioners and the Office, the Office has modified the showing required to establish nonreceipt of an Office action. The showing required to establish nonreceipt of an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement. For example, if a three month period for reply was set in the nonreceived Office action, a copy of the docket report showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action. The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail (e.g., if the practitioner has a history of not receiving Office actions). (Emphasis supplied)

MPEP 711.03(c)

Analysis

A review of Office records reveals that the Notices mailed July 31, 2006 were mailed to a correspondence address in Clearwater, Florida. Additionally, the address in Clearwater, Florida was the correspondence address of record as filed in this office with the application on September 25, 2003. Thereafter, on January 22, 2007, Applicant filed a Change of Correspondence Address wherein Applicant changed his mailing address to Pinellas Park, Florida. With the present petition, filed April 5, 2007, Applicant changes his correspondence address to Largo, Florida.

Office records reveal that the Notices mailed July 31, 2006 were mailed to the correspondence address of record. Thereafter, Applicant changed his correspondence. As such, there are

circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail.

Accordingly, the petition to withdraw the holding of abandonment is dismissed.

Alternate venue

Applicant is strongly urged to file a petition stating that the delay was unintentional. Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an “unintentionally” abandoned application without a showing that the delay in was “unavoidable.” An “unintentional” petition under 37 CFR 1.137(b) must be accompanied by the required fee.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay can not make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revive under 37 CFR 1.137(b).


Further correspondence with respect to this matter should be addressed as follows:

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By FAX: (571) 273-8300
 Attn: Office of Petitions

By hand: Customer Service Window
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Telephone inquiries concerning this petition Decision should be directed to the undersigned at (571) 272-3232.


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